



POLICE DEPARTMENT

October 1, 2018

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In the Matter of the Charges and Specifications :

Case No.

- against - :

2017-17814

Police Officer Momen Attia :

Tax Registry No. 932277 :

Midtown North Precinct :
-----X

At: Police Headquarters
One Police Plaza, 4th Floor
New York, NY 10038

Before: Honorable David S. Weisel
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU:

Jeannie Elie, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent:

Michael Martinez, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
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To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

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CHARGES AND SPECIFICATIONS

1. Police Officer Momen Attia, on or about December 23, 2016, at approximately 2231 hours, while assigned to MTN PCT and on duty, in the vicinity of 1634 Broadway (in front of Winter Garden Theatre), New York County, abused his authority as a member of the New York City Police Department, in that he frisked Yerkebulan Kakimbekov, without sufficient legal authority.

P.G. 212-11, Page 5, Para. 18 – ABUSE OF AUTHORITY – FRISK

2. Police Officer Momen Attia, on or about December 23, 2016, at approximately 2231 hours, while assigned to MTN PCT and on duty, in the vicinity of 1634 Broadway (in front of Winter Garden Theatre), New York County, abused his authority as a member of the New York City Police Department, in that he interfered with Yerkebulan Kakimbekov's use of a recording device without sufficient legal authority.

P.G. 203-10, Page 1, Para. 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on July 19, 2018. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB called Yerkebulan Kakimbekov as a witness. Respondent called Police Officer Steven Fabb as a witness and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, the Court finds Respondent Guilty of Specification No. 1 and Not Guilty of Specification No. 2.

FINDINGS AND ANALYSIS

Introduction

Most of the facts in this case are undisputed. The complainant, Yerkebulan Kakimbekov, was a pedicab driver catering in large part to tourists in Manhattan. On Friday, December 23, 2016, at approximately 2230 hours, he stopped his pedicab in the

parking lane on Broadway between West 50th and 51st Streets. This was in front of the Winter Garden Theatre at 1634 Broadway.

Respondent was assigned to the Midtown North Precinct on a theater detail. His responsibilities included security and crowd control, particularly after shows let out, which in the evening is around 2200 hours or thereafter. It was undisputed that Respondent instructed Kakimbekov to leave the spot. Kakimbekov refused and asked why he had to leave. It is undisputed that Kakimbekov was holding a cell phone and recording the incident. Respondent removed the phone from his hand and placed it in Kakimbekov's pocket. It is further undisputed that Respondent handcuffed and frisked Kakimbekov. He was released without arrest or summons.

The CCRB has charged that Respondent interfered with Kakimbekov's use of a recording device without sufficient legal authority. Respondent argued that, while it was true in a sense that he stopped Kakimbekov from recording, he removed his phone from his hand because he was attempting to handcuff him. Thus, the interference was not without sufficient legal authority.

The CCRB also has charged that Respondent frisked Kakimbekov without legal sufficient authority. Respondent argued that the frisk was justified by Kakimbekov's suspicious behavior and the circumstances of where and when it happened – one of the highest-profile terrorism and active-shooter targets in the city if not the world, two days before Christmas.

Testimony

Because the identities of the three persons involved in the incident are not in question, the testimony has been emended in excerpts where the witnesses did not mention the individuals' names.

YERKEBULAN KAKIMBEKOV testified that he was born in Kazakhstan. He worked in New York as a real estate agent and a pedicab driver. He also was a soldier in the U.S. Army Reserve (Tr. 18-19, 88).

Kakimbekov testified that on December 23, 2016, he was operating his pedicab starting around 1500 to 1600 hours. It was a physically exhausting job and he took breaks often. Around 2200 hours that night, he parked his pedicab in front of the Winter Garden Theatre and rested while listening to music. He had his headphones on and his cell phone in his hand (Tr. 19-21, 51, 58, 60).

Kakimbekov denied that there was a no-standing sign in that space. He asserted that cars were allowed to park there. In fact, three cars were parked there, Kakimbekov contended. He asserted that he was permitted to rest there and wait for fares for 15 to 20 minutes (Tr. 51, 53-55, 59-60, 69-71, 81-82, 84-87; see Respt. Ex. B, photograph of "No Standing Anytime" sign going in both directions, just north of Winter Garden marquee, taken Mar. 27, 2017).

Kakimbekov testified that Respondent directed him to move. He admitted that he refused to do so, asking why he needed to move. Kakimbekov conceded at trial that the Theater District was one of his prime areas of work, but denied that he looked for people exiting theaters at the end of the show as fares. At first, Respondent was standing some distance away, but when Kakimbekov refused to move, Respondent came over. Kakimbekov told him that the sign did not say pedicabs could not park there (Tr. 21-22, 46-47, 49, 63-65, 67-68, 71, 81-83).

Respondent "aggressively" took Kakimbekov's phone and put it in Kakimbekov's pocket. The music was still playing after the headphones had come out, so Kakimbekov

took the phone out to silence it. When he did so, Respondent “grabbed it for the second time” (Tr. 23-24, 74-76).

Another officer, Fabb, approached and both asked for identification. Kakimbekov gave them his New York State driver license, his pedicab license, and his military ID. Kakimbekov confirmed at trial that his military ID looked identical to any other branch of the military, including the regular Army or other branches of the Armed Forces. Kakimbekov asserted that Fabb questioned his status as a member of the military, and told him his ID looked fake (see CCRB Ex. 3, photocopy of Kakimbekov’s military ID; Tr. 23-24, 28, 72-75, 77, 90-91).

Kakimbekov testified that he wanted to take a video of the incident, so he took his phone out of his pocket. Kakimbekov was holding the phone in his right hand. Respondent told him to put the phone away. At the same time, Respondent handcuffed him, grabbing his left hand first, and placed Kakimbekov’s phone in Kakimbekov’s pocket once more. Kakimbekov conceded that the officers loosened the handcuffs for him when he complained that his hands hurt (Tr. 24-29, 77-79, 87).

Kakimbekov testified that Respondent frisked his pockets and took some items out. The officers also conducted an inspection of the pedicab (Tr. 25-26, 29-30, 77-78).

Respondent unhandcuffed Kakimbekov. He shook Kakimbekov’s hand and said, “Sir, it’s busy, and we’re doing our job. Merry Christmas.” The officers indicated that he was free to go. Kakimbekov pedaled away and did not receive any summonses. The entire encounter lasted around seven to eight minutes (Tr. 28, 30, 80, 83-84).

POLICE OFFICER STEVEN FABB had been assigned to the Midtown North Precinct almost his entire career. His main responsibility was to monitor and address conditions in

the Times Square and Theater District areas. Counterterrorism and traffic control were major aspects of his work (Tr. 93-95).

On December 23, 2016, Fabb was assigned to a theater post at the Winter Garden Theatre. He had been assigned to this post over the past 11 years. Fabb was working this day with Respondent, who was assigned similarly to the nearby Gershwin Theatre. Fabb observed Respondent standing next to a pedicab and its driver in front of the Winter Garden (Tr. 94-98, 108-09).

Fabb testified that the pedicab was in a no-standing-anytime zone. This meant that "we allow vehicles that have specific pickup passengers to stop for a short time to pick up . . . their scheduled rides." They would also allow standing for persons with disabilities or "high-profile" people. Parking was not allowed, either for motor vehicles or pedicabs (Tr. 97-99, 109-10).

Fabb observed Kakimbekov, the pedicab driver, go into his pockets repeatedly. Respondent told him to stop. Fabb went over to the two to assist. Based on Kakimbekov's actions, Fabb was unsure if he had a weapon. He also was concerned because it was Times Square and the theaters would be letting out soon (Tr. 99-100, 103-05, 111, 113-15, 118).

Fabb testified that Kakimbekov turned over his pedicab license and "some kind of military ID," but not a New York State driver license. According to Fabb, the purported military ID "just - it didn't look like the other ID's that I've seen." Fabb had seen military IDs before. Kakimbekov's looked "[s]imilar but I hadn't seen one in a while so I was trying to determine based upon the ID in front of me if it was real or not." Fabb admitted that he asked Kakimbekov from where he had obtained the ID (Tr. 100-103, 105).

Fabb assisted Respondent in handcuffing Kakimbekov. Fabb agreed that Kakimbekov had a cell phone in his hand, recording, just before and while he was placed in handcuffs. He did not see a bulge in the driver's pockets (Tr. 104-05, 111-15, 118-19).

Fabb determined that the ID was legitimate and also inspected the pedicab itself. The officers frisked Kakimbekov, then released him with a warning (Tr. 105-06, 117; Respt. Ex. C, Fabb memo book entry).

RESPONDENT too had been assigned to the Midtown North Precinct almost his entire career. He was born in Egypt and grew up in Kuwait. His duties and responsibilities covered the Times Square area. He focused on crowd and traffic control, as well as criminal conditions (Tr. 121-22, 124).

On the evening of December 23, 2016, Respondent was assigned to the theater post at the Gershwin Theatre on 51st Street between Broadway and Eighth Avenue, a post he had worked for 14 years. He was working closely with Fabb, at least when the Winter Garden and Gershwin Theatres let out, as there were several exits to cover (Tr. 123-25).

At approximately 2230 hours, Respondent observed Kakimbekov and his pedicab in front of the Winter Garden in a no-standing zone. Respondent indicated at trial that for-hire vehicles with reservations to pick up specific people were allowed to wait for their fares. It was common for pedicab drivers to pull over and try to pick up people as they left the theaters, but "if you allow him, it would allow everybody else and it would be a mess." Respondent admitted that he had allowed the motor vehicles in front of Kakimbekov to remain (Tr. 125-27, 129, 131-33, 141-43, 161).

Respondent waved his arm at Kakimbekov to move. Kakimbekov stared at him but did not move. Respondent walked over and told him to move, telling him that if he allowed him to stay, he would have to allow everyone (Tr. 131-34, 143-45, 153).

Respondent also asked Kakimbekov for ID. The driver handed over his military ID, "that I wasn't sure about it," as well as his pedicab license, but not a New York State driver license. New York City requires pedicab drivers to have a driver's license and pedicab license. Without the driver's license, Respondent could not run Kakimbekov for warrants (Tr. 134-35, 141, 145-46).

Respondent asserted that Kakimbekov was reaching into his pockets. He told him not to do this. This raised Respondent's level of suspicion about Kakimbekov. He had to grab Kakimbekov's hand at one point to stop him from going into his pockets (Tr. 136-38, 153, 155-58).

Fabb came over to assist. Because Respondent was not familiar with Kakimbekov's military ID, Respondent handed it to him (Tr. 137).

As Fabb was looking at the ID, Respondent observed Kakimbekov remove a cell phone from his pocket. He could tell it was a phone because of the flash. Respondent felt that he needed to restrain Kakimbekov while his ID was investigated because of his refusal to cease going into his pockets and because he kept moving his hands. In the process of handcuffing Kakimbekov, Respondent had to remove the phone from his hand. He put it in Kakimbekov's back pocket. It had nothing to do with not wanting to be recorded, Respondent asserted, because there were plenty of cameras in Times Square anyway (Tr. 138-40, 152, 156, 158-60, 162-64).

Respondent conceded that he did not recall seeing a bulge in Kakimbekov's pockets. He nevertheless frisked Kakimbekov to make sure he did not have anything on him (Tr. 155, 161-62).

Respondent testified that the officers verified Kakimbekov's ID. Because the theaters would be emptying soon, they released him with a warning (Tr. 140-42, 151-52, 154, 161; Ex. D, Respt. memo book entry).

The **CELL PHONE VIDEO** lasts only 30 seconds. It first shows Fabb appearing to examine Kakimbekov's identification documents. It then shows Respondent taking hold of Kakimbekov's left arm. Someone says "take this away." Respondent comes around Kakimbekov's body and says, "You want to escalate the situation." Kakimbekov asks where and why they were taking him (CCRB Ex. 2).

Five **SURVEILLANCE VIDEOS** from the Lower Manhattan Security Initiative were placed into evidence. The cameras were located at 51st Street and Broadway. Each video showed a slightly different perspective, but the file "1121" had the encounter in its entirety.

The "1121" video begins with Respondent walking over to Kakimbekov's pedicab, which was stopped at the north end of the parking lane on Broadway between 50th and 51st Streets. Around 00:33, Fabb comes over as well. The officers and Kakimbekov speak for several minutes. Around 02:25, Fabb checks Kakimbekov's identification documents. At 02:42, Respondent and Fabb appear to confer about the documents.

Around 03:23, the flash light on Kakimbekov's cell phone comes on. Around 03:30, Respondent places his hands on Kakimbekov. Fabb assists and Kakimbekov appears to be placed in handcuffs at 03:49. After several minutes of discussion, around 07:24, Respondent releases Kakimbekov from the handcuffs. At 08:21, Kakimbekov rides his pedicab away.

Analysis

The second specification charges Respondent with abusing his authority by interfering with Kakimbekov's use of his cell phone to record the incident. It is undisputed

that Respondent took away Kakimbekov's phone, but Respondent asserted that he did this only during the course of arresting him and not to interfere with his recording.

Patrol Guide § 203-29, "When a Member of the Service Encounters An Individual Observing, Photographing, and/or Recording Police Activity," became effective June 12, 2018, after the incident in this case, and is not cited in the specification. The new procedure, however, does incorporate language contained in an April 2016 Legal Bureau Bulletin (vol. 46, no. 2). The procedure and the bulletin both state that it is a violation of Department rules to "[i]ntentionally block or obstruct cameras or other recording devices when there is no legitimate law enforcement reason to do so." See PG § 203-29 (1)(a)(1); Bulletin (IV)(c).

The Court agrees with Respondent that he had a legitimate law enforcement reason to remove Kakimbekov's phone while handcuffing him. Whether the handcuffing itself was justified is not actually the issue and is not charged here. Rather, Respondent could not have properly handcuffed Kakimbekov without taking the phone out of his hands.

The Court is not persuaded by the CCRB's argument that Respondent took Kakimbekov's phone because he did not want to be recorded. The cell phone video shows that Respondent first grabbed Kakimbekov's left arm, which was not the side with which he was holding the cell phone. If Respondent had wanted to stop Kakimbekov from recording, he could have just grabbed the phone from his right hand. The fact that Respondent did not do so indicates that his intention was to handcuff Kakimbekov, not to stop him from recording. The removal of the phone was a necessary afterthought.

Furthermore, as Respondent argued, there are so many cameras in Times Square that the incident could not possibly not be recorded. And in fact, the Lower Manhattan Security Initiative camera captured the incident in its entirety, though without audio.

Therefore, the Court finds Respondent Not Guilty of Specification No. 2.

The first specification charges Respondent with frisking Kakimbekov without sufficient legal authority. It is undisputed that Respondent frisked the complainant, so the only question is whether this was legal.

At the time of the incident, the controlling Patrol Guide procedure authorized a frisk only if the officer reasonably suspects he or others are in danger of physical injury. See "Old" Patrol Guide § 212-11 (2), "Stop and Frisk."

It is undisputed that Respondent did not see any bulge on Kakimbekov's person. Nor was he suspected of any offense other than the parking violation. That was the only thing that called the police's attention to him.

Respondent argued that his suspicion of Kakimbekov nonetheless was heightened because of several other factors. He asserted that it was highly unusual for a pedicab driver not to move from a spot once he directed them to do so (Tr. 133). To Respondent, it was a simple issue and a simple request. Kakimbekov's intransigence was suspicious to Respondent. His production of a military ID, rather than a driver's license, was further suspicious. Finally, according to Respondent, Kakimbekov kept reaching into his pockets. All of this took place in Times Square, two days before Christmas.

The Court finds that the CCRB proved by a preponderance of the evidence that Respondent's frisk of Kakimbekov was without legal authority. It was not objectively suspicious, in the investigative encounters sense, for Kakimbekov to protest being told to move from the spot. He did not appear to have a legal right to stand there, and it may be Respondent's experience that most pedicabbies move when told, but that does not mean Kakimbekov's failure to do so gave rise to a reasonable suspicion of physical injury.

Nor was it suspicious that Kakimbekov produced a military ID. The officers' unfamiliarity with such an ID did not give rise to reasonable suspicion of physical injury. It is reasonable to conclude Kakimbekov was trying to assure the officers that he, a member of the United States Army Reserve, was not a threat to anyone.

It is undisputed that Kakimbekov went into his pockets at least twice. According to Kakimbekov, this was once to shut off the music that had been playing on his phone, and a second time to take out the phone to video-record the incident. Neither Respondent nor his partner Fabb recalled that music was playing or that Kakimbekov was trying to shut off the phone. They only testified that he kept going into his pockets even though they kept telling him not to do so.

The tribunal finds Kakimbekov more credible than Respondent or Fabb on this point. The "1121" surveillance video, around 00:55, appears to show Kakimbekov holding a cell phone and Respondent yanking it away. Several minutes pass before Kakimbekov's cell flash goes on and he is handcuffed. It is at this point that Respondent claimed he first saw the phone. This is inconsistent with the video.

Thus, Respondent already knew that Kakimbekov had a phone in his pocket. There was no other visible bulge, and Kakimbekov was handcuffed only after he reached into his pocket to take out the phone to record. Kakimbekov's continued reaching into his pockets, in these circumstances, did not lead to a reasonable suspicion of physical injury on the officers' or others' part. Therefore, the frisk was unauthorized and Respondent is found Guilty.

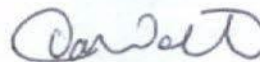
PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was

appointed to the Department on July 1, 2003. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The CCRB recommended the forfeiture of 10 vacation days as a total for both specifications, but Respondent has been found Guilty of only one specification, the frisk. This was a frisk only. There was no search and the stop itself is not in question. The entire encounter lasted seven to eight minutes and Kakimbekov was released without arrest or summons. The Court recommends the forfeiture of two vacation days as a penalty. See Case No. 2014-11138, p. 5 (Sept. 22, 2015).

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED

NOV 09 2018



JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MOMEN ATTIA
TAX REGISTRY NO. 932277
DISCIPLINARY CASE NO. 2017-17814

Respondent was appointed to the Department on July 1, 2003. For his last three annual performance evaluations, he received a 3.5 overall rating of "Highly Competent/Competent" for 2016 and 4.0 "Highly Competent" ratings for 2014 and 2015.

[REDACTED]

Respondent has no disciplinary history.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials